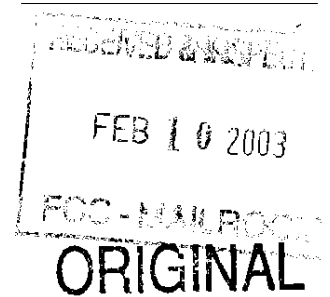


Rebecca Klein
Chairman
Brett A. Perlman
Commissioner
Julie Caruthers Parsley
Commissioner
W. Lane Lanford
Executive Director



Public Utility Commission of Texas

January 29, 2003

Secretary
Federal Communications Commission
445 12th Street S.W.
Washington, D.C. 20554

RE: Notice of Written Ex Parte Comments – 2 Originals tiled in the proceeding captioned:

CC Docket No. 01-338, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers

CC Docket No. 96-98, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996

CC Docket No. 98-147, Deployment of Wireline Services Offering Advanced Telecommunications Capability

Secretary:

On January 28, 2002, I mailed the attached letter to FCC Commissioner Martin and sent copies to each of the other FCC Commissioners.

If you have questions about this filing, please do not hesitate to contact me at 512-936-7019 or bernice.cervantes@puc.state.tx.us

Sincerely,

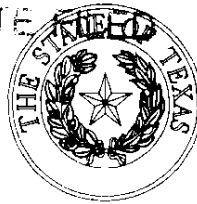
A handwritten signature in cursive script that reads "Bernice Cervantes".

Bernice Cervantes
Public Utility Commission of Texas
Office of Commissioner Brett Perlman

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Brett A. Perlman
Commissioner

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Public Utility Commission of Texas

January 28, 2003

The Honorable Kevin J. Martin
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Dear Kevin:

I want to congratulate you on your very thoughtful speech to the 20th Annual PLI/FCBA conference last month. You accomplished your goal of clearly articulating your position on the historic proceedings currently pending before the Commission.

I appreciate your interest in hearing from state commissioners on the impact of the FCC's pending telecommunications proceedings. As you and I have previously discussed, state commissions can provide a valuable perspective on such issues since we are closest to the local conditions in our jurisdictions. Consequently, I wanted to provide you some of my own impressions of your position and how they will impact telecommunications competition in Texas.

As you are aware, Texas was the second state to certify that a RBOC had completed the 14 point checklist. As a consequence, Texas provides perhaps one of the best barometers of the potential impact of the FCC's pending rulemakings. In addition, we have just completed a comprehensive review of telecommunications competition in Texas and therefore can provide you with specific information that may help you refine your analysis. While this letter incorporates the Texas PUC's recent data, the conclusions are my own.

I will frame my comments around two central questions: (1) How should the Commission deal with unbundling questions related to voice services; and (2) What regulatory framework should the Commission apply in its pending Broadband proceedings?

1. Triennial Review

In the PLI/FCBA speech, you indicate your preference for a simple test to determine when unbundled local switching is no longer necessary: (1) alternative facilities based providers exist and (2) no impairment associated with physical provisioning. You also indicate that unbundled switching may need to stay in place in rural and underserved areas that lack alternative facilities-based providers. Finally, you mention the role that state commissions must play in these decisions.



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In fact, the Texas Commission has recently performed exactly the type of analysis that you discussed in your speech. Last year, the Texas Commission reviewed the necessity for local switching by examining the robustness of the local switching market and whether CLECs would be impaired should switching be removed as an unbundled network element.¹ In applying the FCC's existing test, the Texas Commission found, based on the specific circumstances in our market, that SBC was not offering nondiscriminatory access to the enhanced extended loop (EEL) in urban areas (Zone 1), such that CLECs would be able to utilize their own switching. The Texas Commission, based on a review of an extensive factual record, also found impairment in suburban and rural markets. The Texas Commission left the door open for removal of switching as an unbundled element when SBC can demonstrate that it provides nondiscriminatory access to the EEL to its CLEC customers.

In addition to the MCI arbitration, the Texas Commission's recent report on competition may provide insight as to the impact of the Commission's proceedings.² This Report, which contains exchange level data from local exchange providers, is the most in-depth and recent analysis of local telecommunications competition available.

The Report shows that CLEC market penetration (both in terms of revenues and access lines) has remained essentially flat since January 2001, due in large part to industry conditions (during the last two years 47 Texas CLECs declared bankruptcy and 42 relinquished certifications to serve).³

At the same time, the method of entry for CLECs continues to change, with some form of facilities-based service (UNE-L or carrier-owner facilities) comprising 45 % of CLEC revenues, followed by UNE-P (44%) and resale (12%). On the other hand, the data shows that UNE-P is the primary means of serving residential customers in urban and suburban areas. UNE-P accounts for 76% of CLEC urban residential lines and 67 % of CLEC suburban residential lines in Texas.⁴

These statistics lead me to conclude that while the Texas market is transitioning to facilities-based competition, UNE-P is important for serving Texas residential customers. This data shows, as you indicated, that 'States are best positioned to make [these] highly fact intensive and local determinations.'

¹ *Petition of MCI Metro Access Transmission Services, LLC, Sage Telecom, Inc., Texas UNE Platform Coalition, Mcleod USA Telecommunications Services, Inc., and A T&T Communications of Texas, LP for Arbitration with Southwestern Bell Telephone Company under the Telecommunications Act of 1996, Docket No. 24542. Final Order (date).* ("MCI Arbitration").

² *Report to the 78th Texas Legislature, Scope & Competition in Telecommunications Markets of Texas (Jan 2003)* ("Texas Report"). The Report is available at www.puc.state.tx.us/telecomm/reports/index.cfm.

³ *Id.* at 30.

⁴ *Id.* at 25.

II. Broadband Proceedings

A. Texas Broadband Market

In several proceedings, the Commission has expressed a preference for facilities-based competition and, as you indicate, the D.C. Circuit required that the Commission consider alternative facility providers before reinstating line sharing requirements.

Our data shows that facilities-based competition is already a reality in the Texas broadband marketplace. Recent data indicates that cable and DSL are the dominant forms of broadband competition with other forms (such as wireless or satellite) accounting for 10 percent of the market.⁵

Of the DSL providers, the Texas data indicates that incumbent's providers have just over 85% of the lines (317,774) to the CLECs' 15% (56,879).⁶ Clearly, the dominant form of broadband competition is between cable companies and incumbent telecommunications carriers.

While intermodal competition dominates the Texas broadband market, I nonetheless believe that intramodal competition will play an important role, particularly in suburban and rural markets. It has been our experience in Texas that competitive DSL providers offer different products (i.e., SDSL and IDSL).

They also serve customers unserved by the dominant providers, because they are beyond the reach of SBC's ADSL product offering or live in suburban or rural communities unserved by the incumbent telecommunications providers. A PUC staff analysis shows that there are 95 rural Texas exchanges, representing about 10 percent of all Texas exchanges, that are served by a data CLEC in which no incumbent telecommunications carrier provides broadband service.

I continue to believe that CLECs perform an important role in providing Texas customers with broadband service. As I discuss below, I believe that the Commission can balance the need for investment incentives with the intramodal competition provided by data CLECs.

B. Achieving a Balanced Broadband Regulatory Framework

In your PLI speech, you indicate that your primary goal is encouraging new investment in broadband. Your speech indicates that regulating DSL and cable services similarly would be the best way to achieve this goal.

I believe that the Commission could accomplish the goal of encouraging new investment while ensuring that the broadband competition occurs through both intermodal and intramodal providers. The Commission could accomplish these goals if it were to apply a "layered model" to broadband

⁵ *Id.* at 35.

⁶ Texas PUC Staff Analysis, available upon request.

infrastructure. The “layered model” has been discussed in several recent legal and technical articles and **is** consistent with the underlying protocols governing the Internet.’

Unlike service-based regulation, the “layered model” separates content and applications from the provision of access and transport services and applies a consistent policy to each layer. In this model, the Commission would treat content and applications as information services and, in essence, eliminate the requirement that an incumbent telecommunications provider offer access and transport services to competitors where there is a showing that no provider has **market power**. The Commission would thus remove restrictions not on the basis of network type, but rather on the basis of a “market power” test.

Treating broadband networks in this fashion would focus the inquiry on whether the Commission and state regulator⁵ can rely on competition, instead of regulation, to discipline prices, rather than focus on network type. This model would be also similar to the European Commission’s new telecommunications framework.’

If the Commission were to adopt this framework, it would apply a similar regulatory framework to all broadband infrastructure and could easily accommodate your top priority of stimulating investment and deployment of advanced network infrastructure. Under this framework, if no broadband provider has market power, then no unbundling requirements apply to an incumbent’s investment in new infrastructure. If market power does exist, then access requirements would apply, but could be modified to ensure that ILECs maintain an incentive to invest as follows:

- **Modified TELRIC pricing:** As you suggest in the PLI/FCBA speech, the Commission could adjust the TELRIC pricing formula to account for the risk of the investment.
- **Broadband Service:** Instead of requiring physical unbundling, the Commission could require access in the form of a broadband service offering which would minimize the incumbent’s obligation to physically unbundle the network. The Texas Commission’s arbitrators have already ruled that line sharing should be provided in the form of a service, a decision which has been adopted by the Illinois and Wisconsin Commissions.⁹

⁷ See, Werhach, “A Layered Model for Internet Policy,” __ Colo. J. on Telecommunications and High Technology Law (2002)(forthcoming)(available on the web at www.edventure.com/conversation); Frieden, Adjusting the Horizontal and Vertical in Telecommunications Regulation: A Comparison of the Traditional and a New Layered Approach (available on the web at <http://www.personal.psu.edu/faculty/r/m/rmf5/newregime.doc>); Sicker, Further Defining a Layered Model for Telecommunications Policy (<http://intel.si.umich.edu/tprc/papers/2002/95/LayeredTelecomPolicy.pdf>).

⁸ Marcus, “The Potential Relevance to the United States of the European Union’s Newly Adopted Regulatory Framework for Telecommunications”, July 2002(FCC Office of Policy and Plans) (available on the web at <http://www.fcc.gov/opp/workingp.html>)

⁹ Petition of Covad Communications Company against Southwestern Bell Telephone Company for Post-Interconnection dispute resolution and Arbitration (<http://interchange.puc.state.tx.us/WebApp/Interchange/Documents/313365.DOC>)

The D.C. Circuit's concern regarding the Commission's line sharing obligations would be addressed by this framework because the market power analysis would take into account the ability of alternative facility providers (cable, wireless and satellite) to provide broadband service. This framework would also be consistent with the Computer Science and Telecommunications Board's framework in their recent report entitled "Bringing Home the Bits."¹⁰

A broadband framework such as the one suggested promote new investment in facilities-based competition while assuring that adequate competition exists to discipline prices. It is also consistent with the way that the broadband market appears to be evolving in Texas.

III. Conclusion

As the title of your PLI presentation indicated, the Commission is at the "Crossroads" of many important decisions. I look forward to partnering with you in our common goal of creating a competitive, facilities based telecommunications marketplace.

Sincerely,



Brett A. Perlman

cc: The Honorable Michael K. Powell
The Honorable Kathleen Q. Abernathy
The Honorable Michael J. Copps
The Honorable Jonathan S. Adelstein

¹⁰ Computer Science and Telecommunications Board, "Broadband: Bringing Home the Bits" (2002) (available on the web at http://www7.naiiclnalacadmies.org/c.;tb/pub_hroadhnd.html)